Supreme Court, U.S.
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In The Supreme Court of the United States

STEVEN PHAM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS DIEP PHAM, DECEASED, KINH B. PHAM, LA T. BUI, KHANH BA PHAM, BANG LE, MING NGOC HA, VU DUY NGUYEN, AND KIEU TRANG THI-DO,

Petitioners,

v.

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the United States Court of Appeals for the Fourth Circuit, in drastically departing from the decisions of other United States Courts of Appeals which historically extend broad protection to innocent motorists through omnibus insurance statutes, results in unfairness to the motoring public by creating a substantial risk, if not a probability, that injured motorists across the nation will not be fully compensated for their injuries.

II. Whether the decision of the United States Court of Appeals for the Fourth Circuit, in drastically departing from the decisions of other United States Courts of Appeals which traditionally afford broad protection to innocent motorists under employers' business automobile insurance policies, results in unfairness to the motoring public by creating a substantial risk, if not a probability, that injured motorists across the nation will not be fully compensated for their injuries.

III. Whether the decision of the United States Court of Appeals for the Fourth Circuit, in drastically departing from the decisions of other United States Courts of Appeals which are virtually uniform in holding an insurer to its articulated choice of defenses to liability under a policy, results in unfairness to the nationwide motoring public by allowing an insurer to surprise an injured motorist by proffering a defense that could not be used in the home state of the injured motorist.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

1. *Pham v. Hartford Fire Insurance Co.*, 419 F.3d 286 (4th Cir. 2005).

STATEMENT OF THE BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered the judgment sought to be reviewed on August 23, 2005. On September 23, 2005, the court of appeals entered an order denying the Petitioners' motion to file a suggestion for rehearing en banc out of time. Jurisdiction to review on a writ of certiorari the Court of Appeals' judgment is conferred upon the United States Supreme Court by 28 U.S.C. § 1254(a).

PROVISIONS INVOLVED

Va. Code Ann. § 38.2-2204.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Virginia, the court of first instance, had jurisdiction over this case pursuant to 28 U.S.C. § 1332.

The Petitioners filed this action seeking to recover compensation for the death of Louis Diep Pham ("Pham"). Pham was a resident of Colorado, and was killed in an automobile accident in Denver, Colorado when the vehicle he was driving was struck by an automobile owned and being driven by Erwin Ovidid Guerra ("Guerra"). (A-2.) At the time of the accident in

early 1995, Guerra was a resident of Virginia, and was employed by OSP Consultants, Inc. ("OSP"), a Virginia corporation with its principal place of business in Virginia. (A-3.) OSP was in the business of furnishing fiber-optic cable installation services to cable companies throughout the United States. (*Id.*) In its business, OSP sent work crews from its Virginia headquarters to different locations nationwide. During such temporary assignments, OSP provided its crews with an apartment in which to live, and a weekly per diem allowance. (*Id.*)

At the time of the accident, Guerra had a regular, permanent position with OSP. (*Id.*) He was sent by OSP on a temporary assignment to Denver, where OSP was installing fiber-optic cable. (*Id.*) Guerra was paid his regular, weekly wages, and, in addition, was paid a weekly per diem allowance. (*Id.*) He was also furnished with free housing in OSP-provided apartments in Aurora, Colorado. (*Id.*) OSP maintained an office at the apartments it provided to its employees, and the employees would meet at that office to obtain their work assignments and transportation to the job sites. (*Id.*) While working in Denver, Guerra held the position of "lead laborer," and, as part of his employment responsibilities, he was required to drive OSP employees to and from the work site, to organize and to supervise his crew, and to act as liaison between the crew and OSP supervisors. (A-3 to A-4.)

OSP workers away on temporary assignment would usually socialize on the weekends. (A-4.) OSP permitted such employees to drink alcohol on the weekends. (*Id.*) OSP had a policy of giving its workers

in Denver a cash payment of $105 every Friday evening. (*Id.*) OSP did not permit its company-owned vehicles to be used by its employees after they completed their daily work assignments. (*Id.*) Consequently, it was necessary for at least some OSP employees to have other vehicles in order to obtain meals, groceries, and other necessities, and to engage in after-hours social activities. (*Id.*)

OSP had a policy of allowing certain employees to drive their personal automobiles when on temporary assignment, because OSP benefited from this arrangement by saving the considerable expenses associated with transportation fares, rental vehicles, and purchase and depreciation costs connected with using OSP's business automobiles for temporary assignments. (*See id.*) After he had worked on temporary assignment in Denver for some time, Guerra was given permission by OSP to return to his home in Virginia in order to get his personal automobile and to drive it back to Colorado. (*Id.*) OSP permitted Guerra to use his automobile in Colorado in order to obtain meals and other necessities for himself and other OSP employees, and to transport himself and other OSP employees to and from social activities. (*Id.*)

At 2 a.m. on a Sunday morning, after drinking and socializing with other OSP employees at a Denver restaurant, Guerra was driving a co-worker back to the OSP apartments in Guerra's personal automobile. (*Id.*) Guerra drove through a red light, and collided with the car being driven by Pham. All of the occupants of Pham's vehicle were seriously injured, and Pham later died as a result of his injuries. (*Id.*)

At the time of the accident, OSP was insured under a business automobile policy ("BAP") issued by Respondent Hartford Fire Insurance Company ("Hartford"). (A-5.) The BAP provided:

> **PART IV—LIABILITY INSURANCE**
> **A. WE WILL PAY**
>
> 1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance, or use of a covered auto.

(A-45.)

Of the nine possible categories of covered autos, OSP was insured under the "any auto" provision. (A-7, A-62, A-65.)

An employee using a covered auto could be an insured under the policy. (A-7.) The BAP defined an "insured" as follows:

> **D. WHO IS INSURED.**
>
> 1. You are an insured for any covered auto.
>
> 2. Anyone else is an insured while using with your permission a covered auto you own, hire or borrow except: